Sharifah Sofia bt Syed Hussein (representing Hak Asasi Hidupan Liar Malaysia Global) & Ors v Pengarah Kepada Lembaga Kebajikan Haiwan

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMON NO WA-24NCVC-2689–12 OF 2021
LEONG WAI HONG JC
20 JUNE 2022

Civil Procedure — Discovery — Pre-action — Plaintiffs applied for pre-action discovery — Whether application was fishing expedition — Whether documents requested by plaintiffs were relevant and necessary — Whether documents requested by plaintiffs were official secrets — Whether plaintiffs had locus standi to sue defendant — Animal Welfare Act 2015 s 4 — Rules of Court 2012 O 24

This originating summons was an application for pre-action discovery by NGOs and concerned citizens and members of the public ('the plaintiffs') against the director of the Animal Welfare Board ('the defendant'). The purpose of the application was to verify compliance by the Animal Welfare Board with its functions and tasks as mandated by the Animal Welfare Act 2015 ('the Act'). On 9 September 2021, the plaintiffs had vide their solicitors emailed a letter to the defendant requesting copies of all minutes of meetings from the time of the establishment of the Animal Welfare Board in 2016 to the current date and a list of all the activities that were carried out by the Animal Welfare Board pursuant to s 4 of the Act. However, the defendant refused, failed or neglected to provide the requested documents without providing any valid basis to do so. The defendant responded to the plaintiffs' first letter via email that the documentation requested by the plaintiffs were strictly confidential and access was restricted to members of the board, attendees of the said meetings and officers in the Veterinary Services Department or the Ministry of Agriculture. The defendant provided brief information on the activities that had supposedly been carried out since the establishment of the Animal Welfare Board. In response to the defendant's first email, the plaintiffs' solicitors issued a letter to the defendant that the plaintiffs still wished to obtain the relevant documentation and/or details in relation to the activities that were carried out by the Animal Welfare Board since its establishment in 2016. The respondent responded insisting that the Animal Welfare Board had carried out their roles and responsibilities as stipulated under the Act without proffering further evidence thereof. The plaintiffs' solicitors then once again requested documentation related to the activities that had supposedly been carried out by the defendant. Due to the failure of the defendant to respond, the plaintiffs' solicitors then requested for all the relevant documentation on an urgent basis.

The defendant still failed, refused and neglected to respond to the plaintiff's letter. In light of the defendant's refusals to provide the requested documentation to the plaintiffs, the plaintiffs filed this pre-action discovery for all documents that were relevant in the execution of the defendant's powers under the Act particularly under s 4. The defendant objected to the plaintiffs' application on the grounds that: (a) the application was a fishing expedition; (b) the documents requested by the plaintiffs were not relevant and not necessary; (c) the plaintiff failed to identify the possible cause of action and proposed statement of claim to the court; and (d) the documents requested were official secrets as they involved the official business of the government. The defendant also raised the issue of locus standi of the plaintiffs to sue on behalf of animals.

Held allowing the plaintiffs' application:

(1) The application by the plaintiffs in particular the first to third plaintiffs which were NGOs set out with special interests in animal welfare could not be said to be a fishing expedition. The documents sought were clearly identified. They related specifically to the performance by the Animal Welfare Board of the functions set out in s 4 of the Act. Applying the trawl and drop analogy, the court was of the view that the plaintiffs' application was not a 'fishing expedition' in the context of an aimless trawling of an unlimited sea. The originating summons was not a fishing expedition (see paras 31–33).

(2) The plaintiffs had clearly stated that their intention was to file a suit for misfeasance in public office against the defendant if the Animal Welfare Board had failed to carry out its functions under s 4 of the Act as mandated by the Parliament. The documents sought were clearly relevant and necessary. The pre-action discovery was necessarily required even before an action was initiated as it was precisely to enable the plaintiffs to decide whether they could even commence legal action against the defendant. The approach was sensible and practical as it could avoid necessary litigation thus saving costs, and preventing wastage of time and resources which was what pre-action discovery sought to achieve. In any event, since the defendant's position was that it had fully carried out its functions under s 4 of the Act, as mandated by Parliament, there was really nothing to hide. It should be proud to show that it had fully carried out its said functions (see paras 34–36).

(3) The defendant did not produce any certificate by a public officer certifying the documents sought were official secrets. In the premises, the court dismissed the objection that the documents could not be discovered (see para 44).

(4) The first to the third plaintiffs had sufficient locus standi irrespective of the test to be applied. The court was of the view that the first to the third

A plaintiffs, as NGOs set up to look after the rights of animals, possessed sufficient locus standi to file the present originating summons (see para 47).

[Bahasa Malaysia summary

B Saman pemula ini adalah permohonan untuk penzahiran pra-tindakan oleh NGO dan rakyat yang prihatin serta orang awam ('plaintif') terhadap pengarah Lembaga Kebajikan Haiwan ('defendan'). Tujuan permohonan tersebut adalah untuk mengesahkan pematuhan Lembaga Kebajikan Haiwan dengan fungsi dan tugasnya seperti yang diamanatkan oleh Akta Kebajikan C Haiwan 2015 ('Akta tersebut'). Pada 9 September 2021, plaintif telah melaluii peguamcara mereka menghantar emel surat kepada defendan meminta salinan semua minit mesyuarat dari masa penubuhan Lembaga Kebajikan Haiwan pada 2016 hingga tarikh semasa dan senarai semua aktiviti yang dijalankan D oleh Lembaga Kebajikan Haiwan menurut s 4 Akta tersebut. Bagaimanapun, defendan enggan, gagal atau mengabaikan untuk memberikan dokumen yang diminta tanpa memberikan sebarang asas yang sah untuk berbuat demikian. Defendan menjawab surat pertama plaintif melalui emel bahawa dokumentasi yang diminta oleh plaintif adalah sulit dan akses terhad kepada ahli lembaga E pengarah, hadirin mesyuarat tersebut dan pegawai di Jabatan Perkhidmatan Veterinar atau Kementerian Pertanian. Defendan memberikan maklumat ringkas mengenai aktiviti yang kononnya telah dijalankan sejak penubuhan Lembaga Kebajikan Haiwan. Sebagai jawapan kepada emel pertama defendan, peguamcara plaintif mengeluarkan surat kepada defendan bahawa plaintif F masih ingin mendapatkan dokumentasi dan/atau butiran yang berkaitan berhubung dengan aktiviti yang dijalankan oleh Lembaga Kebajikan Haiwan sejak penubuhannya pada tahun 2016. Responden menjawab dengan menegaskan bahawa Lembaga Kebajikan Haiwan telah menjalankan peranan dan tanggungjawab mereka seperti yang ditetapkan di bawah Akta tersebut G tanpa mengemukakan keterangan lanjut mengenainya. Peguamcara plaintif kemudian sekali lagi meminta dokumentasi berkaitan aktiviti yang kononnya telah dijalankan oleh defendan. Disebabkan kegagalan defendan untuk memberikan balasan, peguamcara plaintif kemudiannya meminta semua dokumentasi yang berkaitan dengan segera. Defendan masih gagal, enggan H dan lalai untuk menjawab surat plaintif. Memandangkan keengganan defendan untuk memberikan dokumentasi yang diminta kepada plaintif, plaintif memfailkan penzahiran pra-tindakan ini untuk semua dokumen yang relevan dalam pelaksanaan kuasa defendan di bawah Akta khususnya di bawah s 4. Defendan membantah permohonan plaintif atas alasan bahawa: I (a) permohonan tersebut adalah memancing maklumat; (b) dokumen yang diminta oleh plaintif adalah tidak relevan dan tidak perlu; (c) plaintif gagal untuk mengenalpasti kausa tindakan yang munasabah dan pernyataan tuntutan yang dicadangkan kepada mahkamah; dan (d) dokumen yang diminta adalah rahsia rasmi kerana ia melibatkan urusan rasmi kerajaan.

Defendan juga membangkitkan isu locus standi plaintif untuk menyaman bagi pihak haiwan. A

Diputuskan, membenarkan permohonan plaintif:

(1) Permohonan oleh plaintif khususnya plaintif pertama hingga ketiga yang merupakan NGO yang mempunyai kepentingan khusus dalam kebajikan haiwan tidak boleh dikatakan sebagai ekspedisi memancing maklumat. Dokumen yang diminta dikenalpasti dengan jelas. Mereka berkaitan secara khusus dengan prestasi Lembaga Kebajikan Haiwan fungsi yang ditetapkan dalam s 4 Akta tersebut. Menggunakan analogi 'trawl and drop', mahkamah berpandangan bahawa permohonan plaintif bukanlah 'ekspedisi memancing maklumat' dalam konteks 'pukat tunda tanpa tujuan di laut tanpa had'. Saman pemula bukanlah ekspedisi memancing maklumat (lihat perenggan 31–33). B C D

(2) Plaintif telah menyatakan dengan jelas bahawa niat mereka adalah untuk memfailkan saman atas salah laku dalam jawatan awam terhadap defendan sekiranya Lembaga Kebajikan Haiwan gagal menjalankan fungsinya di bawah s 4 Akta tersebut seperti yang dimandatkan oleh Parlimen. Dokumen yang diminta adalah jelas relevan dan perlu. Penzahiran pra-tindakan tersebut semestinya diperlukan walaupun sebelum tindakan dimulakan kerana ia adalah tepat untuk membolehkan plaintif memutuskan sama ada mereka boleh memulakan tindakan undang-undang terhadap defendan. Pendekatan tersebut adalah wajar dan praktikal kerana ia boleh mengelakkan litigasi yang diperlukan sekali gus menjimatkan kos, dan mengelakkan pembaziran masa dan sumber yang merupakan penzahiran pra-tindakan yang ingin dicapai. Walau apa pun, memandangkan kedudukan defendan adalah bahawa ia telah menjalankan sepenuhnya fungsinya di bawah s 4 Akta tersebut, seperti yang diamanatkan oleh Parlimen, sebenarnya tiada apa yang perlu disembunyikan. Ia patut berbangga untuk menunjukkan bahawa ia telah melaksanakan sepenuhnya fungsinya (lihat perenggan 34–36). E F G

(3) Defendan tidak mengemukakan apa-apa perakuan oleh pegawai awam yang memperakui dokumen yang diminta adalah rahsia rasmi. Di dalam premis tersebut, mahkamah menolak bantahan bahawa dokumen tersebut tidak dapat ditemui (lihat perenggan 44). H

(4) Plaintif pertama hingga ketiga mempunyai locus standi yang mencukupi tanpa mengira ujian yang akan digunakan. Mahkamah berpendapat bahawa plaintif pertama hingga ketiga, sebagai NGO yang ditubuhkan untuk menjaga hak haiwan, mempunyai locus standi yang mencukupi untuk memfailkan saman pemula semasa (lihat perenggan 47).] I

Cases referred to

Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 JMB [2018] MLJU 697, CA (folld)

Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor [2017] 10 MLJ 213, HC (refd)

Datuk Haji Dzulkifli bin Datuk Abdul Hamid v Public Prosecutor [1981] 1 MLJ 112, FC (refd)

Government of Malaysia v Fung Fon Chen @ Bernard & Anor [2013] 1 LNS 1543, CA (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe [2017] 6 MLJ 363; [2017] 8 CLJ 554, CA (folld)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525; [2014] 3 MLJ 145, FC (refd)

Norwich Pharmacal Company v Customs and Excise Commissioners [1973] 3 WLR 164, HL (folld)

See Kok Koi v Chong Kui Seng & Ors and another Appeal [2010] 2 CLJ 481, CA (refd)

Sufian bin Mohamad v Pengarah, Jabatan Bomba dan Penyelamat Malaysia Negeri Sarawak [2019] MLJU 2057; [2019] 1 LNS 2061, HC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd lwn Jabatan Bomba Dan Penyelamat Negeri Pahang Darul Makmur [2014] 1 LNS 728, HC (refd)

Takong Tabari v Government Of Sarawak & Ors [1996] 5 MLJ 435; [1995] 1 CLJ 403, HC (refd)

Tan Sri Hj Othman Saad v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)

Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd [2003] 1 SLR 75, HC (refd)

Legislation referred to

Animal Welfare Act 2015 ss 3, 4, 4(1)

Evidence Act 1950 ss 126, 127, 128, 129

Official Secrets Act 1972 ss 1, 2, 2A, 2B, 13A, 16A, Schedule

Rules of Court 2012 O 24 rr 5, 7A, 7A(9), 8, 9, 13, O 53, Forms 38, 39, 40

Rules of the Supreme Court 1990 [SG] O 24 r 6

Rajesh Nagarajan (with Pavitra Loganathan) (Raj & Sach) for the applicant.

Mohd Isa bin Md Nor (Senior Federal Counsel, Ministry of Agriculture and Food Industries) for the respondent.

Leong Wai Hong JC:

INTRODUCTION

[1] 'All animals are equal, but some animals are more equal than others.'

[2] Such is the famous refrain from *Animal Farm*, by George Orwell, published in 1945. A satirical allegorical novella, it tells the story of a group of animals who rebel against their human master, hoping to create a society where animals can be equal, free and happy. This is, of course, fiction.

[3] On Planet Earth the reality is that it is only humans who can create an ecological environment where animals can be safe, free and happy. This OS is an application for pre-action discovery by NGOs and concerned citizens and members of the public against The Director of the Animal Welfare Board ('Animal Welfare Board' or 'the defendant'). Its purpose is to verify compliance by the Animal Welfare Board with its functions and tasks as mandated by the Animal Welfare Act 2015 ('Animal Welfare Act 2015' or 'Act').

[4] I heard counsel on 21 March 2022, 4 April 2022 and 20 April 2022. On 12 May 2022 I allowed the OS but confined the pre-action discovery documents to only the activity reports from the date of establishment of the Animal Welfare Board to date.

BACKGROUND FACTS

[5] The ten plaintiffs here had filed an OS for pre-action discovery against The Director of the Animal Welfare Board. Their pleaded case is as follows.

[6] The plaintiffs are representatives from different animal welfare groups and/or societies in Malaysia.

[7] The defendant is the Director of the Animal Welfare Board, a statutory body established pursuant to s 3 of the Animal Welfare Act 2015 which is entrusted with objectives and functions stipulated in s 4(1) of the Act.

[8] On 9 September 2021, the plaintiffs had vide their solicitors emailed a letter dated 8 September 2021 ('the plaintiffs' first letter') to the defendant requesting the following documents:

(a) copies of all minutes of meetings from the time of establishment of the Animal Welfare Board in 2016 to the current date; and

(b) a list of all the activities that were carried out by the Animal Welfare Board pursuant to s 4 of the Act.

[9] However, the defendant refused, failed and/or neglected to provide the requested documents without providing any valid basis to do so.

[10] On 9 September 2021, the defendant responded to the plaintiffs' first letter via email ('the defendant's first email') that the documentation requested by the plaintiffs were strictly confidential and access was restricted to members of the board, attendees of the said meetings and/or officer(s) in the Veterinary Services Department or the Ministry of Agriculture.

[11] In addition, the defendant via the defendant's first email provided brief information on the activities that have supposedly been carried out since the establishment of the Animal Welfare Board.

[12] In response to the defendant's first email, the plaintiffs' solicitors issued a letter dated 23 September 2021 ('the plaintiff's second letter') to the defendant, asserting and/or reiterating that the plaintiffs still wish to obtain the relevant documentation and/or details in relation to the activities that were carried out by the Animal Welfare Board since its establishment in 2016.

[13] However, the defendant responded on 28 September 2021 via email ('the defendant's second email') insisting that the Animal Welfare Board had carried out their roles and responsibilities as stipulated under the Act without proffering further evidence thereof.

[14] The plaintiffs' solicitors then responded to the defendant's second email with a letter dated 6 October 2021 ('the plaintiff's third letter') once again requesting for the documentation related to the activities that have supposedly been carried out by the defendant. Nevertheless, the defendant has failed, refused and/or neglected to respond to the plaintiffs' third letter as to date.

[15] Due to the failure/neglect and or refusal of the defendant to respond to the plaintiffs' third letter, the plaintiffs' solicitors had issued yet another letter dated 8 October 2021 ('the plaintiffs' fourth letter') to the defendant to request for all the relevant documentation on an urgent basis. However, the defendant still failed, refused and/or neglected to respond to the plaintiffs' fourth letter as to date.

[16] In light of the defendant's refusals to provide the requested documentation to the plaintiffs, the plaintiffs filed a pre-action discovery for:

(a) all documents that are relevant in the execution of the defendant's powers under the Act particularly under s 4.

[17] The defendant opposed the OS on the following grounds:

(a) the application is a fishing expedition;

(b) the documents requested are not relevant and not necessary;

(c) the plaintiff failed to identify the possible cause of action and proposed statement of claim to the court; and

(d) the documents requested are official secrets as they involved the official business of the government.

A REVIEW OF THE LAW ON PRE-ACTION DISCOVERY IN MALAYSIA

Applicable rules of court

[18] Order 24 rr 7A, 8 and 13 of the ROC 2012, are the applicable rules on pre-action discovery. They read as follows:

7A Discovery against other person (O 24, r 7A)

(1) *An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.*

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.

(3) An originating summons under paragraph (1) or a notice of application under paragraph (2) shall be supported by an affidavit which shall —

(a) In the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and

(b) In any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the originating summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

(5) *An order for the discovery of documents before the commencement of*

proceedings or for the discovery of documents by a person who is not a party to the proceedings *may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.*

(6) An order for the discovery of documents may —

(a) Be made conditional on the applicant giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

(b) Require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.

(7) A person shall not be compelled by such an order to produce any document which he could not be compelled to produce —

(a) In the case of an originating summons under paragraph (1), if the subsequent proceedings had already been commenced; or

(b) In the case of a notice of application under paragraph (2), if he had been served with a subpoena to produce documents at the trial.

(8) For the purposes of rules 10 and 11, an application for an order under this rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

(9) Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, *the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis*.

8 *Discovery to be ordered only if necessary* (O 24, r 8)

On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

13 Production to be ordered only if necessary (O 24, r 13)

(1) *An order for the production of any documents for inspection* or to the Court *shall not be made* under any of the foregoing rules *unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*

(2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground,

the Court may inspect the document for the purpose of deciding whether the claim or objection is valid. (Emphasis added.)

RELEVANT MALAYSIAN CASE LAW ON PRE-ACTION DISCOVERY

[19] There are two leading authorities on this area of the law in Malaysia. Both are Court of Appeal judgments. They are *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe* [2017] 6 MLJ 363; [2017] 8 CLJ 554 (CA) ('Infoline') and the subsequent case of *Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 JMB* [2018] MLJU 697 (CA) ('Bandar Utama Development'). In both panels sit Mary Lim JCA.

Infoline

[20] In *Infoline*, Mary Lim JCA (delivering the judgment of the court) has this to say of the history of pre-action discovery and the rationale for the insertion of the new O 24 r 7A in our ROC 2012:

[13] Order 24 r 7A is new specific provision enabling discovery in two situations. In the first scenario, discovery is sought prior to the commencement of action whereas in the second, it is sought after commencement of proceedings but against a non-party. The application for pre-action discovery is by means of an originating summons whereas in the latter, it is by means of a notice of application.

[14] *In summary, O 24 r 7A(3) requires an applicant seeking discovery of documents before action to*:

(i) State the material facts pertaining to the intended proceedings;

(ii) State whether the person against whom the order is sought is likely to be a party in the subsequent proceedings in the High Court;

(iii) Specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made; and

(iv) Identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power. (Emphasis added.)

[21] In *Infoline*, Mary Lim JCA has this to say of Singapore cases which had considered their equivalent of our O 24 r 7A, which is O 24 r 6:

[16] Given that O 24 r 7A is new provision under our Rules of Court 2012, the respondent had invited the court to consider the approach of the courts in Singapore on the operation and application of their equivalent O 24 r 7A, which is O 24 r 6. Having considered them, we are not disinclined to follow them finding the cases cited persuasive as the procedural requirements on pre-action discovery are substantially similar.

A [17] The leading authority is the Court of Appeal's decision in *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR (R) 485, a decision under the old O 24 r 7A, now amended to O 24 r 6.

...

B [19] Subsequently, Lai J in *Ching Mun Fong v Standard Chartered Bank* [2012] 2 SLR 22, held that a pre-action application is particularly appropriate where the applicant needs information or evidence 'to mount a claim, and not to fish for additional evidence to ground further causes of action':

> C 8. What then is the purpose of pre-action discovery? In *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR (R) 485 ('Kuah Kok Kim') at [31], *the Court of Appeal explained that pre-action discovery is to assist a plaintiff who 'does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer*'. The word 'viable' must not be understood to mean that the plaintiff is entitled to pre-action discovery for the purposes of augmenting his case or to 'complete his entire picture of the case'. If that was the D case, the ordinary processes of general and specific discovery under O 24 rr 1 and 5 respectively would be subverted ... *Instead pre-action discovery serves a somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to allow him to commence proceedings*.

E [20] Three cases were examined by Lai J; namely *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR (R) 39 and *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR (R) 375 where the applications were refused; and *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] SLR (R) 321 where the application was allowed. In both *Asia Pacific Breweries* and *Ng Giok Oh*, the F applicants already knew their causes of action and were not otherwise constrained from commencing proceedings. The applications were really to enable the applicants to assess or augment the strength of their case. In Beckkett Pte Ltd however, the position was somewhat different. The defendant bank (qua pledgee) had sold certain shares belonging to the applicant (qua pledgor). *The application for pre- action discovery of documents relating to the 'details of the manner of sale of the* G *pledged shares (whether by private treaty or auction)' was granted because the court found that without the information sought, the applicant would have no idea whether it had a basis to bring a claim against the defendant for failing to take reasonable steps to obtain the best price.*

[21] Further, Lai J was of the view that the Rules of Court:

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> ... exists to provide a systematic and orderly process for the discovery of evidence leading to trial. *The rule allowing for pre-action discovery complements this by helping potential plaintiffs to ascertain if they are in a position to commence proceedings: by virtue of the disclosed documents the potential plaintiff will be able to decide if he has a cause of action against the defendant*. (Emphasis added.)

I

[22] In *Infoline*, Mary Lim JCA after reviewing Singapore, UK and Australian caselaw summarised the principles applicable as follows:

> [36] Considering the appeal properly under O 24 r 7A, *we are of the view that the*

whole intent behind O 24 r 7A is the saving of costs, resources and time if early discovery is ordered, in fact ordered even before proceedings are commenced. If discovery reveals that the applicant's concerns are unfounded, that in this case the respondent's termination or cessation as a beneficiary is proper and in accord with the terms of the trust deed, litigation can largely be avoided. This obviously means saving of both time and costs ...

[37] With those considerations, what O 24 r 7A *then requires from the applicant is an explanation as to why pre-action discovery and not discovery in the course of action or proceedings is necessary. The requisites in O 24 r 7A(3) indicate that pre-action discovery is really to assist a prospective litigant plaintiff to determine whether he has a viable claim against the intended defendant ...*

[38] Insofar as the documents sought to be discovered are concerned, the documents must be specified or sufficiently described. All this is for practical purposes so that the order is capable of response and compliance from and by the defendant who is the appellant before us ...

[39] Finally, the applicant has to identify the person having possession, custody or power over the documents sought ...

[42] Therefore, in exercising discretion whether to grant discovery of specified or described documents in the possession, custody or power of the appellant, the respondent must satisfy the court that discovery of the same before filing of action against the appellant is indeed necessary, necessary at the particular stage of the application, and that is necessary because the order of discovery will allow for the fair disposal of the cause or matter or that it will lead to a saving of costs. *The respondent must show that the discovery is necessarily required even before an action is initiated as it is precisely to enable the respondent to decide whether he can even commence action* against the appellant in particular, to start with. And, if the information revealed from that discovery can determine or assist in reaching an answer to that predicament, then the order ought to be made. *Such an approach is not only fair but sensible and practical as it can obviously avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is what pre-action discovery seeks to achieve*. Where the court is of the opinion that the applicant is unable to satisfy these conditions, certainly the court must dismiss the application as is apparent from the terms of r 8. (Emphasis added.)

Bandar Utama Development

[23] In *Bandar Utama Development*, Hamid Sultan JCA (delivering the judgment of the court) after saying that Mary Lim JCA's judgment in *Infoline* must be read together with his judgment said the threshold test to satisfy an order for pre-action discovery under O 24 r 7A is extremely high in contrast to common law right:

[12] Pre-action discovery is not related to contractual parties but it is addressed to third parties who may be tortfeasors, etc. or parties who are necessary for the purported plaintiff to succeed in a claim or a potential party to be the defendant. ...*The threshold test to satisfy an order for pre-action discovery under O 24 r 7A is*

A *extremely high in contrast to common law right,* as the rules sets out specific requirements and the court must exercise its power with caution and circumspect. It is a power which must be exercised in a genuine case and not for the purpose of annoying a third party or in cases related to fishing expedition, etc. (Emphasis added.)

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[24] In *Bandar Utama Development*, Hamid Sultan JCA went on to review the leading UK case which reviewed and settled the common law jurisprudence on pre-action discovery. The case was *Norwich Pharmacal Company v Customs and Excise Commissioners* [1973] 3 WLR 164 ('Norwich'):

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> [13] The common law position for pre-action discovery was explained in great detail by House of Lords in *Norwich Pharmacal Company v Customs and Excise Commissioners* [1973] 3 WLR 164. A part of the judgment is reproduced here … as follows:
>
> D My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. … They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortuous acts of others so as to facility their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the E wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration.

F

[25] In *Bandar Utama Development*, Hamid Sultan JCA then summarised his understanding of *Norwich* as follows:

> [14] *In the Norwich case, the House of Lords stated that where a person, albeit* G *innocently and without incurring any personal liability, became involved in the tortious acts of others, he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a statutory duty or otherwise; and that, accordingly, prima facie the respondents were under a duty to disclose the information* H *sought.* In this case, the court held that a party could bring a specific action by writ against a person for discovery in the name of a potential defendant if that person has facilitated the wrongdoing of the potential defendant and has the necessary information. (Emphasis added.)

I

A SUMMARY OF THE LAW ON PRE-ACTION DISCOVERY

[26] The following are the principles to be applied on pre-action discovery as distilled from O 24 rr 7A, 8 and 13 of the ROC 2012, *Norwich*, *Infoline, Bandar Utama Development* and case law:

(a) the burden of proof lies on the plaintiff to show that the court should exercise its discretion to grant a pre-action discovery;

(b) *in respect of a pre-action discovery for a defendant to disclose documents on the identity of the wrongdoers,* the plaintiff should show that the defendant although not the wrongdoers, has somehow got mixed up in the tortious acts of that wrongdoers so as to facilitate their wrongdoings so that he comes under a duty to assist the plaintiff who had been wronged by disclosing the identity of the wrongdoers;

(c) *in respect of a pre-action discovery for information contained in a document to be provided by a defendant* the plaintiff must show that the information is necessary *in order for him to determine if he can even commence legal action against the intended defendant.* In such cases, the pre-action discovery order ought to be made to avoid unnecessary litigation thus saving costs, preventing wastage of time and resources which is what pre-action discovery seeks to achieve;

(d) to resist disclosure, the defendant can show that the plaintiff is on a *fishing trip or fishing expedition*. In such a situation, the application will be dismissed. What amounts to a *fishing trip or fishing expedition* is vividly illustrated in this judgment of the Singapore High Court in *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75 Choo Han Teck JC and cited in *Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor* [2017] 10 MLJ 213 Wong Kian Kheong JC:

> [6] In my view, I would hold that *a 'fishing expedition'* in the context of discovery *refers to the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a 'fishing expedition'*. (Emphasis added.)

(e) as an aside, it would not be remiss of me to add that using the act of fishing as an analogy to illustrate what is or is not a fishing expedition has respectable provenance. Retired Court of Appeal Judge Mahadev Shanker narrated observing Punch Coomaraswamy, at the time a Senior Partner at Braddell Brothers, rebutting his learned friend's submission that in his application for discovery he was on a fishing expedition by saying:

> My Lord, a fishing expedition is one where the applicant does not clearly know what documents he is after ... My case is not like that. I have identified the documents I require these people to disclose. Since I know where the fish are, this is not a fishing expedition.
>
> (see *Summom Bonum The Ultimate Good* by Dato' Mahadev Shanker collated and edited by Santhi Latha 2021 Ed at p 221).

(f) to resist disclosure, the defendant can also show that that there is some consideration of public policy which prevents him from making this disclosure. Consideration of public policy which can prevent him from making disclosure maybe that such disclosures would or might impair or hamper the efficient conduct of a defendant's statutory duties. And secondly such disclosure would or might be prejudicial to those whose identity would be disclosed. The court will then have to do a balancing act by examining the facts. On the whole, if a document would be discoverable in a discovery application filed once a suit is commenced, such a document should be discoverable in my view. Especially if its disclosure now is necessary in order for the plaintiff to determine if he can even commence legal action in the first place against an intended defendant. For in such cases, the pre-action discovery order ought to be made to avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is the very objective of O 24 r 7A of the ROC 2012;

(g) apart from considerations of public policy that prevent disclosure, the defendant can also show that he is prevented by common law or some statute from making this disclosure. Statutory defences available are for example legal professional privilege under ss 126–129 of the Evidence Act 1950 or documents and information protected under ss 2, 13A and 16A of the Official Secrets Act 1972; and

(h) when ordering pre-action discovery, a defendant is entitled to his costs of the application, unless the court orders otherwise, and of producing a copy each of the documents ordered on an indemnity basis (see O 24 r 7A(9) of the ROC 2012). Thus, a defendant who sought the protection of a court order before giving pre-action discovery should be entitled to his costs of the application unless the court is of the view the defendant had unreasonably opposed the application. For practical purposes, it is useful for the court to request parties to agree on the costs of the defendant for producing a copy each of the documents ordered. This is because O 24 r 7A(9) of the ROC 2012 reads as follows — *Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.*

ISSUES IN THIS OS

Defendant's argument [1]: the application is a fishing expedition

[27] The plaintiffs had filed a pre-action discovery for all documents that are relevant in the execution of the defendant's powers under s 4 of the Animal Welfare Act 2015.

[28] Section 4 of the Act reads: **A**

Functions of the Board

(1) The Board shall have the following functions:

(a) To monitor the work of associations or bodies established for the purpose of preventing trauma, pain or suffering to animals; **B**

(b) To monitor the work for the protection of animals including animals in rescue homes, animal shelters, or sanctuaries;

(c) To monitor the situation of the place where the animals may find a shelter when the animals are infirmed or in need of protection; **C**

(d) To impart education in relation to the humane treatment of animals and to encourage the formation of public opinion relating to the infliction of trauma, pain or suffering to animals;

(e) To promote the animal welfare by means of lectures, books, posters, cinematographic exhibitions and others; **D**

(f) To advise the Minister on any matter relating to animal welfare, the prevention of infliction of trauma, pain or suffering on animals, the prevention of unnecessary killing and to provide for the welfare and wellbeing of the animal; **E**

(g) To administer, enforce and ensure the effective implementation of this Act; and

(h) To discharge all such functions as authorized under this Act or subsidiary legislation made under this Act, including those functions that may be entrusted to the Board under the direction of the Minister. **F**

[29] The long title of the Animal Welfare Act 2015 clearly states its objective is 'to provide for the establishment of the Animal Welfare Board, to set out the functions of the Board, to promote the welfare and responsible ownership of animals, and for related matters'. **G**

[30] The functions of the Animal Welfare Board as set out in s 4 of the Animal Welfare Act 2015 are noble. If carried out fully, as mandated by Parliament, this would be an achievement civil society, in particular, and all Malaysians, in general, would be proud of. **H**

[31] To my mind, this application by the plaintiffs in particular the first to third plaintiffs which are NGOs set out with special interests in animal welfare cannot be said to be a fishing expedition. **I**

[32] The documents sought are clearly identified. They relate specifically to the performance by the Animal Welfare Board of the functions set out in s 4 of the Animal Welfare Act 2015. Applying *the trawl and drop analogy*, I am of the

A view that the plaintiffs' application is not a 'fishing expedition' in the context of an aimless trawling of an unlimited sea. The plaintiffs know a specific and identifiable spot into which they wish to drop their line. The plaintiffs have dropped their line. The plaintiffs have clearly identified the documents they want. Since the plaintiffs know where the fish are, this is not called a 'fishing B expedition'. This is called catching fish!

(see *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75 Choo Han Teck JC and *Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor* [2017] 10 MLJ 213 Wong Kian Kheong JC).

C

[33] I therefore hold that this OS is not a fishing expedition.

The defendant's arguments [2] and [3]: the documents requested are not relevant and not necessary; the plaintiffs failed to identify the possible cause of action and D *proposed statement of claim to the court*

[34] These two grounds are without merits. The plaintiffs had clearly stated that their intention is to file a suit for misfeasance in public office against the defendant if the Animal Welfare Board had failed to carry out its functions E under s 4 of the Animal Welfare Act as mandated by Parliament. The documents sought are clearly relevant and necessary.

[35] The pre-action discovery is necessarily required even before an action is F initiated as it is precisely to enable the plaintiffs to decide whether they can even commence legal action against the defendant. Such an approach is sensible and practical as it can obviously avoid unnecessary litigation thus saving costs, preventing wastage of time and resources which is what pre-action discovery seeks to achieve. See *Infoline* at [42].

G

[36] In any event, I am of the view that since the defendant's position is that it had fully carried out its functions under s 4 of the Animal Welfare Act, as mandated by Parliament, there is really nothing to hide. It should be proud to show that it had fully carried out its said functions.

H

The defendant's fourth argument — the documents requested are official secrets as they involved the official business of the government

The law on Official Secrets Act 1972

I

[37] The relevant sections are ss 1, 2A, 2B, 16A and the Schedule.

[38] Section 1 defines 'official secret' as:

'*official secret' means any document specified in the Schedule* and any information and

material relating thereto *and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted',* as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B. (Emphasis added.)

[39] Section 2A and the Schedule read:

(a) 2A The Minister may, from time to time, by order published in the Gazette, add to, delete from, or amend any of the provisions of the Schedule hereto.

(b) SCHEDULE [Section 2A]

Cabinet documents, records of decisions and deliberations including those of Cabinet committees;

State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;

Documents concerning national security, defence and international relations. (Emphasis added.)

[40] Section 2B states:

2B *A Minister, the Menteri Besar or the Chief Minister of a State may appoint any public officer by a certificate under his hand to classify any official document, information or material as 'Top Secret', 'Secret', 'Confidential' or 'Restricted',* as the case may be. (Emphasis added.)

[41] Section 16A reads:

16A A certificate by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or by the principal officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret shall be conclusive evidence that the document, information or material is an official secret and shall not be questioned in any court on any ground whatsoever.

RELEVANT CASE LAW

[42] The earlier cases took the view that if a document is classified as a secret by its owner, the court will not question that even if it contains information generally known to the public (see *Datuk Haji Dzulkifli bin Datuk Abdul Hamid v Public Prosecutor* [1981] 1 MLJ 112 (FC), *See Kok Koi v Chong Kui Seng & Ors and another Appeal* [2010] 2 CLJ 481 (CA) and *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525 (FC).

[43] Subsequent cases took a more inquisitorial and robust approach. The courts will scrutinise the said documents to ensure that the assertion of official secret is not just a mere label or a false label. The courts will have to be satisfied that harm will be caused to the public interest by its disclosure before upholding non-disclosure.

(see *Sufian bin Mohamad v Pengarah, Jabatan Bomba dan Penyelamat Malaysia Negeri Sarawak* [2019] MLJU 2057; [2019] 1 LNS 2061 Supang Lian J at para (31–33), *Syarikat Kenderaan Melayu Kelantan Bhd lwn Jabatan Bomba Dan Penyelamat Negeri Pahang Darul Makmur* [2014] 1 LNS 728 Mariana Hj Yahya J at [23] and *Takong Tabari v Government Of Sarawak & Ors* [1996] 5 MLJ 435; [1995] 1 CLJ 403 at held 1–3, Richard Malanjum J).

APPLICATION TO OUR FACTS

[44] In this OS the defendant did not produce any certificate by a public officer certifying the documents sought here are official secrets. In the premises, I dismiss the objection that the documents can't be discovered.

Locus standi to file OS

[45] During the course of submissions, the defendant raised the issue of locus standi of the plaintiffs to sue on behalf of animals.

[46] Submissions were made as to whether the test should be 'sufficient interest' or the 'adversely affected test' which requires an applicant to show he had *a real and genuine interest* in the subject matter which is the test for judicial review under O 53 of the ROC 2012 as set out in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 (FC) or the 'adversely affected' test set out in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 (SC), *Tan Sri Hj Othman Saad v Mohamed bin Ismail* [1982] 2 MLJ 177 (FC) Abdoolcader J (speaking for the court) and *Government of Malaysia v Fung Fon Chen @ Bernard & Anor* [2013] 1 LNS 1543 (CA) Rohana Yusuf JCA (majority).

[47] To my mind, the first to third plaintiffs here have sufficient locus standi irrespective of the test to be applied. Unlike the fictional world in *Animal Farm*, one surely can't expect the animals on Planet Earth to rise up in rebellion and come to court to file an action under the Animal Welfare Act! I am of the view the first to third plaintiffs, as NGOs set up to look after the rights of animals, possess sufficient locus standi to file this OS.

DECISION

[48] I hereby make the following orders:

(a) in respect of the first to third plaintiffs prayer 1 (a) of the OS is allowed but documents to be discovered are confined to activity reports from the date of establishment of the Animal Welfare Board to date;

(b) defendant to file and serve Form 38 (List of Documents) and Form 39 (Affidavit Verifying the List of Documents) under O 24 r 5 of the ROC 2012;

(c) defendant to file and serve Form 40 (Notice to Inspect Documents) under O 24 r 9 of theROC 2012;

(d) costs of all documents requested by the first to third plaintiffs to be borne by the first to third plaintiffs on proper and reasonable charges or by soft copies if required at no costs by consent; and

(e) no order as to costs as this is a public interest matter.

Plaintiffs' originating summons allowed.

Reported by Mohd Kamarul Anwar